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IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

KEITH MILTON RHINEHART, *Petitioner,*
v.
THE STATE OF WASHINGTON, *Respondent.*
No. .....

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF WASHINGTON

KEITH MILTON RHINEHART, the above named petitioner, prays that a Writ of Certiorari issue to review the judgment of the Supreme Court of the State of Washington entered in the above entitled case on May 3, 1967.

I.

CITATIONS TO OPINIONS BELOW

The opinion of the Supreme Court of the State of Washington, printed in Appendix B hereto, *infra* p. ....., is reported in 70 W.D.2d 627 (1967).

II.

JURISDICTION

On March 2, 1967 Department No. 1 of the Supreme Court of the State of Washington affirmed petitioner's conviction. A Petition for an *en banc* rehearing was timely filed and the same was denied on May 3, 1967. The judgment (remittitur) of the Supreme Court of the State of Washington was entered on May 3, 1967 and is printed in Appendix C hereto, *infra* p. ..... The jurisdiction of this court to review the case on Petition for certiorari rests upon Title 28, U.S. Code, §1257 (3).

III.

QUESTIONS PRESENTED

A. Whether one convicted of the crime of sodomy is denied equal protection of the law under the Fourteenth Amendment to the Constitution of the United States by the trial court's refusal to either set aside the conviction on the basis of affidavits submitted to the trial court or grant a hearing upon request, when the offer to submit proof at the requested hearing and the affidavits show that the sodomy statute was not applied equally and was being used by law enforcement officials as a club of vengeance and a tool of the police used against the petitioner whom they had singled out for punishment because of petitioner's exercise of constitutionally protected rights of freedom of religion and speech.

B. Whether the sodomy statute of the State of Washington is unconstitutional in that it purports to make criminal private consensual sexual acts which are not affected with sufficient public interest to be the subject matter of the exercise of the police power of the State.

C. Whether an accused is denied due process of law under the Fourteenth Amendment to the Constitution of the United States by the trial court's refusal to set aside a conviction on the grounds that the sodomy statute of the State of Washington (R.C.W. 9.79.100) is a statute which punishes conduct which cannot constitutionally be punished and fails to give adequate warning of the boundary between the constitutionally permissible and constitutionally impermissible applications of the statute.

D. Whether the sodomy statute of the State of Washington (R.C.W. 9.79.100) is an unconstitutional attempt

by the legislature to make acts criminal which are deemed ethically improper by majority religious beliefs in America and has as its purpose and primary effect the advancement or inhibition of religion in violation of the First and Fourteenth Amendments to the Constitution of the United States.

IV.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The constitutional provisions involved are the First, Fifth, and Fourteenth Amendments to the Constitution of the United States. The statute involved is Revised Code of Washington 9.79.100. All are printed in Appendix A hereto, *infra* pp. .....

V.

STATEMENT

By information filed in King County Superior Court in the State of Washington on May 18, 1965, after a preliminary hearing in Justice Court, the petitioner, Keith Milton Rhinehart, was accused of one count of oral sodomy on one James Miller (R. 0172). The charging portion of the information recited the following:

> "He, the said Keith Milton Rhinehart, in the County of King, State of Washington, on or about the 11th day of April, 1965, wilfully, unlawfully and feloniously did carnally know one James Guy Miller, a living human being and a male person, with the mouth and tongue; contrary to the statute in such case made and provided, and against the peace and dignity of the State of Washington."

The petitioner was tried and convicted by a jury on July 15, 1965. Petitioner timely filed a written motion for arrest of judgment or in the alternative, for a new

trial (R. 0123) and thereafter filed a motion to set aside the verdict (R. 0105-0108) and requested a hearing on the equal protection issues raised hereafter. These motions were and this request was denied on December 6, 1965 (R. 0687).

Judgment was pronounced on December 6, 1965, sentencing petitioner to imprisonment for a maximum term of ten years (R. 0112).

An appeal was taken to the Supreme Court of the State of Washington which affirmed the judgment and sentence of the Superior Court.

Petitioner Keith Milton Rhinehart is a 29-year-old ordained minister of the Aquarian Foundation in Seattle, Washington. The Foundation maintains a church in the Capitol Hill area of Seattle, holds regular church meetings, and maintains and operates a Sunday School for the children of the church members. The Seattle church has approximately 600 members. Auxiliary churches have been established in Spokane, Washington, and in Chicago Illinois, and Honolulu, Hawaii.

The Aquarian Foundation attempts to provide spiritual help to all interested persons including unwed mothers, ex-convicts, persons of interracial marriage, homosexuals and lesbians (R. 0529-31; 0593-95). The Foundation, like other religious faiths, concerns itself with and studies sexual morality. One of the basic religious beliefs of petitioner and members of his church is that all forms of private consensual sexual conduct, whether heterosexual or homosexual, by reasonably biologically mature individuals which does not threaten the sanctity of a marriage or the preservation of a family is a matter of personal

preference and not the proper subject matter of the exercise of the police power of the State. The church takes the position that persons who by physical makeup or conscious desire are inclined toward sexual relationships with the same sex should be permitted to exercise these private sexual desires with the same anonymity that is granted to the heterosexual (R. 0620).

Petitioner is a spiritualist medium of considerable prominance. He has lived in Seattle, Washington for over ten years and has actively practiced his particular skill as a medium. He is highly vocal and zealous in his assertion of his beliefs and those of the Aquarian Foundation including those related to sexual morality. In addition, petitioner is extremely individualistic in dress and appearance—for a long time before his arrest and including during trial of this cause, he wore a dark beard. It is not surprising that the police who are by training and experience distrustful of that which is different in society were aware of petitioner. The Seattle Police Department bunco and morals detail each had files on petitioner covering a span of over ten years even though petitioner had never been arrested or charged with a crime in the over ten years he had been in Seattle and had but one prior conviction of a misdemeanor when a teenager in Denver, Colorado. Members of the police force were frequent visitors to petitioner's church and frequent unwelcome visitors to his home. Petitioner's efforts to introduce evidence of police harrassment of his religious activities were unsuccessful, the trial court ruling the same to be inadmissible.

On April 6, 1965, the petitioner appeared on the first of what was to be a long series of hourly television pro-

grams featuring interviews with internationally famous persons. The purpose of the program was to discuss moral philosophical and spiritual problems and acquaint the viewers with the practices and beliefs of the Aquarian Foundation. The program interviews had been filmed by petitioner and television production technicians at the expense of the Foundation on a recent trip around the world made for that purpose. The first program consisted for the most part of a filmed interview between petitioner and Mrs. Aldous Huxley. At the conclusion of the program, an ex-convict, a lesbian, a homosexual, an unwed mother, and a couple who were parties to an interracial marriage, were each given a brief opportunity to voice their views. The program concluded with petitioner's appeal to the viewers to understand all of these people as human beings created by God and afford them the privilege of privacy of action free from the police power of the State as long as their actions did not harm any other members of society (R. 0620).

One week later the petitioner was arrested and accused of the crime of sodomy. The arresting officer testified that he took a statement from James Miller, age 16 years, while Miller was in juvenile detention. Miller was not unfamiliar with police procedure, having been sent to Fort Warden, a juvenile detention facility, at age 13 years for breaking and entering and being a runaway. He was in detention because he had been picked up by police in connection with their investigation of a car prowling incident. At the time of his pickup by the police, James Miller was on parole from Fort Warden—he had not been home for several days. He could not write and he could not read the statement prepared for him by the

police officer. Miller signed the statement alleging that petitioner paid Miller for a single act of oral sodomy purportedly carried out with the mutual consent of petitioner and Miller in the privacy of petitioner's home (R. 0504-26). James Miller, on parole, admittedly away from his home for several nights, and by his own purported admission a participant in a felonious act of oral sodomy as a male prostitute, was promptly released from detention after signing the accusatory statement. The petitioner was immediately arrested and this proceeding commenced.

One of the women members of the Aquarian Foundation, without the knowledge, consent or request of petitioner or his trial counsel, thereafter contacted James Miller and as a result of that contact Miller gave her a statement denying that any sexual act had occurred. Miller stated that he was afraid that he would be sent away for car prowling, being away from home overnight, and because of his prior record. As a result of that fear, Miller gave the police the statement they seemed to desire from him. The police told him that petitioner was "an atheist, a quack, and had put on a goofed-up (sic) TV show on Channel 13. The (sic) said he had a homosexual on his TV program." Miller stated the police told him they were "really out to get Rhinehart and they needed a statement from me to help them." Miller believed he would be released if he gave the statement implicating petitioner in an act of sodomy (Ex. 15, R. 0695-96; R. 0537-39; 0560-62).

The officer who took the statement from James Miller ascertained that Miller and petitioner had been together

for approximately one-half hour. He, along with a fellow officer, found the police files on petitioner which included an advertisement for the TV program shown scarcely one week before containing petitioner's picture; a mug shot from petitioner's only conviction and that a misdemeanor when petitioner was a teenager in Colorado; and other pictures and material taken and gathered over a ten year period.

James Miller did not appear on the date initially set for petitioner's trial. A new trial date was scheduled (R. 0589, 90). James Miller was apprehended by the police shortly after he did not appear on the scheduled trial date. He was detained at the local youth center while another statement was taken consistent with the first one given to the police. He was then committed to Cascadia, a juvenile institution. He remained there through the trial of petitioner (R. 0429; 0519-0522).

At petitioner's trial, Miller was asked if he told one of those in attendance on the first day of the trial that he was testifying at the trial as he was because he was under police pressure to do so. At first Miller denied that he had made such a statement. He then admitted that he did make the statement that he was testifying under police pressure but that this statement was false (R. 0494, 95).

Petitioner testified in his own defense. His testimony was a complete denial of any sexual acts with Miller and an assertion that he merely talked with the boy in his car for a period of time and that while he and Miller were talking, Miller asked the petitioner if he was a homosexual and propositioned the petitioner. Petitioner advised Miller that he was not a homosexual and was not inter-

ested in the proposition. Petitioner advised Miller that he was a minister; that homosexuals were welcomed into the church and invited Miller to contact petitioner or any other members of the church if he ever wanted help (R. 0591-97).

Miller's statements contain in some detail descriptions of certain items in and about petitioner's home. His testimony at the trial contained a more limited description of such items. Petitioner denied that Miller had ever been in his home. Subsequent to petitioner's conviction and while this matter was on appeal to the Supreme Court of the State of Washington, Miller voluntarily appeared at petitioner's attorney's office and gave a long affidavit indicating among other things that he was supplied with the information about the items in and around petitioner's home by the police officers who took his statement. This affidavit is reprinted in Appendix D hereto.

Seventeen affidavits; a *pro se* memorandum; Articles of Incorporation and By-Laws of the Aquarian Foundation; another memorandum and a letter from petitioner to the trial judge in support of petitioner's post trial motions were submitted prior to judgment and sentence being entered against petitioner. In the letter to the judge, petitioner asked the court to permit him to call witnesses to provide a more complete picture of the discriminatory enforcement pattern of the sodomy statute in the City of Seattle than was provided by the affidavits (R. 0013, 0017, 0023-27, 0071-102, 0113-120, 0178-395).

The contents of the affidavits directly called to the attention of the court are summarized in this and the following paragraphs. There are at least four public gathering places, taverns or after hours spots, in the City of

Seattle which have for a substantial number of years catered almost exclusively to male and female homosexuals. These were named. Each of these establishments is and has been frequented regularly by uniformed Seattle police officers on their beat or as doormen. In addition, homosexual parties with uniformed policemen and officers in attendance as doormen or to keep order are not uncommon in certain other establishments. Attendance at such functions may exceed 300 persons. The regular homosexual public gathering places are frequently packed. Attendance of 200 or more persons at one of these establishments is not uncommon.

The age of the persons in attendance at these establishments range from a little over 15 years to over 40 years of age. A significant proportion of those in attendance are in the teenage range from 15 through 18.

The persons in attendance drink beer in taverns and beer and hard liquor at the after hours establishments. Homosexual dancing (males with males and females with females) is typical. A few of the persons in attendance will wear portions of the attire of the person of the opposite sex. The dancing is accompanied with French kissing, genital and anal fondling, and other forms of contact to produce homosexual stimulation. Male couples and female couples commonly and without apparent concern continue these forms of sexual stimulation at booths and tables and will even openly fondle each other's exposed or semi-exposed genitals. Performance of actual acts of sodomy involving genital penetration into the partner's mouth occurs in some of the more dimly lit, yet public, portions of the establishments. Homosexual propositions (frequently for a price) are made in the immedi-

ate presence of police officers. These persons are not bothered or arrested by the police and continue to attend the establishments aware of police presence and aware that they will not be followed for purposes of detection and arrest or arrested as a result of their activities. Some of the affidavits were sworn statements by married persons that they had engaged and continue to engage in acts made criminal by the sodomy statute, namely, oral sodomy.

One of the affiants stated that he had inquired of the police department about the Aquarian Foundation, had been referred within the department to an officer who advised him that he should stay away from the Aquarian Foundation and the petitioner as the police were out to get the petitioner. The petitioner also offered to prove that the sodomy statute was not applied equally and was being used by law enforcement officials as "a club of vengeance" and "a tool of the police" used against petitioner who they had "singled out for punishment." He further offered

> "to introduce evidence that homosexuals are permitted to participate in sexual activities in public bars and clubs under the supervision and control of the Seattle Police Department and with their direct knowledge and assent. . . . Thousands of persons from every walk of life are permitted to violate this statute under the watchful eye of the Seattle Police Department, yet the defendant [petitioner] is singled out for prosecution for allegedly committing the same acts."

Petitioner was denied his request for a hearing to produce the evidence contained in his affidavits to establish that the criminal action against him denied him equal protection of the law.

While the matter was on appeal to the Supreme Court of the State of Washington an affidavit was submitted in connection with petitioner's Motion to the State Supreme Court for leave to file a Motion for New Trial. This affidavit by a third year law student summarized the results of that student's investigation of sodomy arrests in the four years immediately preceding the arrest of petitioner. There were but 104 arrests for sodomy in King County in this four year period. The investigator was unable to obtain adequate information as to 12 of these arrests. As to the remaining 92, 7 acts involved the use of force; 2 involved the use of duress; 58 involved a participant 15 years of age or younger; 14 involved acts committed in public; 2 involved substantial outside pressure from members of the family to arrest; and 9 involved an apparent police or prosecuting attorney desire to arrest for reasons other than any violation of the sodomy statute. Thus, persons were just not arrested in King County for homosexual acts committed in private between persons of reasonable biological maturity (16 years of age or older) without the use of force or improper duress unless the police or prosecuting attorney had a desire to arrest the person for reasons other than the violation of the sodomy statute or, in a rare situation, unless members of the family exerted sufficient outside pressure on the police and prosecuting attorney and forced them to arrest (R. 0711-735).

Petitioner has previously petitioned the Honorable William O. Douglas, Associate Justice of the Supreme Court of the United States and Circuit Justice for the Ninth Circuit for a stay of the order and decision of the Supreme Court of the State of Washington, which appli-

cation for stay was denied and petitioner is now incarcreated and serving his sentence. His minimum term has been set at three and one half years.

VI.

REASONS FOR GRANTING THE WRIT

1. The decision of the court below in the instant case is directly in conflict with the equal protection clause of the Fourteenth Amendment to the Constitution of the United States as interpreted by this court in *McLaughlin v. Florida*, 379 U.S. 184, 13 L.Ed.2d 222, (1964); *Two Guys From Harrison-Allentown, Inc. v. McGinley*, 366 U.S. 582, 6 L.Ed.2d 551, 81 S. Ct. 1135 (1961); *Schneider v. Rusk*, 377 U.S. 163, 12 L.Ed.2d 218, 84 S. Ct. 1187 (1964); and *Yick Wo v. Hopkins*, 118 U.S. 356 (1886).

If the sodomy statute of the State of Washington (R.C.W. 9.79.100) is otherwise constitutional, the police or the prosecutor may exercise discretion in making arrests under it provided that they exercise this discretion in a fair and impartial manner and do not illegally discriminate between persons in similar circumstances. The illegal discrimination in the petitioner's case is that he was charged with the crime of sodomy because of his exercise of constitutionally guaranteed rights of freedom of religion and freedom of speech. On the basis of the affidavits and the record made by petitioner, he was at least entitled to a hearing and an opportunity to establish the fact of his allegations to this effect. There can be little question but that if such allegations are true, they constitute a denial of equal protection. As was stated in *Yick Wo v. Hopkins, supra*, it is a denial of equal protection of the law when that law

". . . is applied and administered by public authority with an evil eye and an unequal hand, so as practically to make unjust and illegal discriminations between persons in similar circumstances . . ."

2. The decision of the court below in the instant case is in conflict with *Griswold v. Connecticut*, 381 U.S. 479, 14 L.Ed.2d 510, 85 S. Ct. 1678 (1965) and is opposed to the concept that certain zones of individual privacy are created by specific guarantees in the Bill of Rights which

"have penumbras formed by emination from these guarantees that help give them life and substance." *Griswold v. Connecticut, supra*, page 484.

The act with which petitioner is charged would not even be a crime under Sections 213.2 and 213.3 of the Model Penal Code of the American Law Institute. This Penal Code basically adopts the philosophy expressed in Gebhard, *Sex Offenders*, 1965, page 875, as follows:

"What two or more consenting adults do sexually in private should not be governed by statute law."

The age of sixteen years is adopted by the *Model Penal Code* as being the age at which a person is considered to be sufficiently mature to consent to sexual acts. Kinsey, in his now famous work entitled *Sexual Behavior in the Human Male*, at page 447, also points out that the adult male by age sixteen has already adopted his pattern of sexual behavior so that contact at that age will have little if anything to do with the future sexual development of the male.

Kinsey and Gebhard and all other persons and groups which have *empirically studied* sexual behavior come to the same basic conclusion. That conclusion is:

"We may summarize by stating that the law against adult homosexual activity is designed not for the protection of the person or property but for the enforcement of our cultural taboo against homosexuality.

. . .

The homosexual offender versus adults as a group, do not appear particularly criminal or dangerous. They do not damage society, they merely do not fit into it." Gebhard, *Sex Offenders*, pages 324, 357.

Kinsey, in his report on *Sexual Behavior in the Human Female* (1953) indicates that conduct of the type prohibited by the statute here in question is a common part of the sexual relations of married couples. Forty-nine percent of married females had engaged in oral stimulation of the male genitalia (fellatio) and fifty-four percent had had their own genitalia stimulated orally (cunnilingus). (Table 100, page 399). Moreover it appears that at least sixty percent of the males in the United States engaged in the prohibited activity with another male by the age of forty-five years, and that thirty-seven percent of all males past puberty have had such prohibited experiences ending in orgasm (Kinsey, *Sexual Behavior in the Human Male*, pages 610-666). Fully twenty-five percent of the adult males in our population at some time between the ages of sixteen and fifty-five have more than incidental experience with homosexual activity of a type prohibited by the sodomy statute, which experience spans a continuous period of at least three years (Kinsey, *Sexual Behavior in the Human Male*, page 650). Kinsey also reports that approximately four percent of the adult white males in our population are exclusively homosexual throughout their lives—a group comprising in the United States approximately 3,000,000 males.

Gebhard, *Sex Offenders*, previously referred to, is an empirical study in which the investigators classified various sex offenders by age and type of sex crime. All "adult" males convicted of homosexual crimes with male "adults" were placed within one group. (For the purpose of the study, persons sixteen years of age or older were considered to be "adults".) The males in this group averaged eighty-five homosexual experiences each year outside institutions and, for the most part, would fall within the general classification of persons whose sexual contacts are predominantly homosexual. The group of adult males convicted of homosexual crimes with other adult males was compared to a control group with a composition similar to society at large. The investigators found that the homosexual group ranks slightlty above the control group in terms of socio-economic status (Table 9, page 53); that the homosexual's age preference for sexual partners followed that of the control group (639); and that the per capita crime rate of the homosexual group was not significantly different from that of the general population if convictions for crimes involving homosexual conduct were excluded (350, Table 124, page 732). The study found that there was no correlation between the homosexual activity of a person and gambling (p. 374); use of addicting or habit-forming drugs (p. 734-737); or the use of alcohol (p. 740). The homosexual offender is less apt to commit other sexual crimes than the public at large (p. 354, 825, 835). In other words, those persons who engaged in homosexual activity in private with mutual consent were no more dangerous than any other person in society—their sexual behavior simply did not comply with the domi-

nant ethical standard, but did not in any way interfere with what other persons in society might choose to do sexually or in any other area.

This court has unquestionably held in *Griswold v. Connecticut, supra*, that the state police power does not extend to the marital bed. The right of privacy in a marital relation is so fundamental and basic that the state may not undertake to regulate by means of the criminal law the details of that intimacy. Thus, the attempt by the State of Washington to make mouth-genital contact criminal simply is unconstitutional when applied to married persons. There is no rational or empirical reason why this statute should not also be unconstitutional when applied to other consenting adults whose private acts do not interfere with the rights of others in society.

R.C.W. 9.79.100 is also void on its face. The sodomy statute at least partially encompasses the unconstitutional (sexual activity between married persons) as did the ordinance in *Lovell v. Griffin*, 303 U.S. 444 (1938). In the *Lovell* case this court held that an ordinance was void because it applied by its term to the distribution of literature whether or not the same was obscene (and therefore constitutionally subject to regulation) and without limitation as to time or place of distribution. The ordinance was void on its face because it purported to regulate that which constitutionally may not be regulated along with that which constitutionally might be regulated.

3. The decision of the court below in the instant case is directly in conflict with the due process clause of the Fourteenth Amendment to the Constitution of the United

States and the decision of this court in *Wright v. Georgia*, 373 U.S. 284, 10 L.Ed.2d 349, 83 S. Ct. 1240 (1963). In the *Wright* case, *supra*, this court reversed the conviction of six Negroes for breach of the peace committed by playing basketball in a public park in Savannah, Georgia and committed by refusing to obey the command of a police officer. In so doing this court stated:

> "This case falls within the rule that a generally worded statute which is construed to punish conduct which cannot constitutionally be punished is unconstitutionally vague to the extent that it fails to give adequate warning of the boundary between the constitutionally permissible and constitutionally impermissible applications of the statute."

It is beyond question that *Griswold v. Connecticut*, 381 U.S. 479, 14 L.Ed.2d 510, 85 S. Ct. 1678 (1965) holds that mouth-genital contact between married persons in private which is made criminal by *R.C.W.* 9.79. *100* may not be constitutionally punished. The right of privacy applied by this court in the *Griswold* case, *supra*, is not a new concept. See Beaney, *The Constitutional Right to Privacy*, 1962 Supreme Court Review 212 and Griswold, *The Right to be Let Alone*, 55 Northwestern University Law Rev. 216 (1960). It is, at best, extremely uncertain as to how far the *Griswold* doctrine extends. Under these circumstances it cannot be said that the statute provided appellant with the adequate notice required by the due process clause.

4. The decision of the court below in the instant case is in conflict with the establishment clause of the First Amendment and with the Fourteenth Amendment to the Constitution of the United States. It is implicitly in con-

flict with the decisions of this court in *McGowan v. Maryland*, 366 U.S. 420, 6 L.Ed.2d 393, 81 St.Ct. 1101 (1961) and *Abbington School District v. Schempp*, 374 U.S. 203, 10 L.Ed.2d 844, 83 S.Ct. 1560 (1963).

R.C.W. 9.79.100 flows directly from early Judaeo-Christian ethical laws which were incorporated into statute law in England in the year 1533 during the reign of King Henry VIII. That law provided:

> "Any person who shall commit the abominable and detestable vice of buggery with either mankind or beast, shall be adjudged guilty of a felony, and shall suffer death without the benefit of clergy." *The Law of Crime Against Nature*, 32 N.C. Law Rev. 312 (1953-54).

This court stated in *McGowan v. Maryland, supra,*:

> "The First and Fourteenth Amendments afford protection against religious establishment far more extensive than merely to forbid a national or state church . . .The Establishment Clause does not ban federal or state regulation of conduct whose reason or effect merely happens to coincide or harmonize with the tenets of some or all religions. In many instances, the Congress or state legislatures conclude that the general welfare of society, wholly apart from any religious considerations, demands such regulation. . . . And the fact that this agrees with the dictates of the Judaeo-Christian religions while it may disagree with others does not invalidate the regulations."

The test in each case as defined in *Abbington School District v. Schempp, supra,* is as follows:

> "What are the purpose and the primary effect of the enactment? If either is the advancement or inhibition of religion then the enactment exceeds the scope of legislative power as circumscribed by the Constitution. That is to say that to withstand the stric-

tures of the Establishment Clause there must be a secular legislative purpose and a primary effect that neither advances nor inhibits religion."

It is clear that the statute here involved is based on early views and proscriptions of Judaeo-Christian beliefs. The state has failed to show a proper secular legislative purpose for the statute. While one may agree with the ethical standards involved in *R.C.W. 9.79.100,* it is quite another thing to declare that these ethical standards may form the basis of a punitive criminal statute when all objective inquiry demonstrates that the statute advances no proper secular legislative purpose. Why punish those whose behavior does not meet with your approval unless that behavior adversely affects other members of society?

5. The question presented is of substantial importance to all persons whose exercise of religious freedom and freedom of speech or any other constitutionally guaranteed right may be disliked by local law enforcement officials. Sodomy statutes comparable to *R.C.W. 9.79,100* are prevalent in all states of the Union except Illinois. The type of conduct here in question is always consensual and done in private. Therefore, one accused of such a crime is always victim to the testimony of the alleged other participant in the crime. As in this case, all the police have to do is find someone over whom they have some leverage and control to testify that such an act took place. The defendant then has no way of rebutting this testimony other than by pitting his believability against the believability of the state and its accurer. This is a fifty-fifty chance at best and a much slighter chance when one takes into consideration the fact that persons who engage in constitutionally protected freedom of speech and re-

ligion in such a way as to arouse the ire of the police department are almost always unusual and, therefore, suspect.

6. The question presented is of substantial importance as *R.C.W. 9.79.100* and the sodomy statutes prevalent in all other jurisdictions except Illinois could be used to imprison over half the adult male population in the United States and could be frequently and repeatedly used against some three million males whose sexual activity is almost exclusively homosexual. These are people who, while one may disapprove and disagree with their sexual behavior, do not harm others in society. They would find as much difficulty in complying with *R.C.W. 9.79.100* as would married heterosexuals have difficulty in complying with a statute which would make sexual intercourse between married persons criminal. Sodomy statutes are not generally enforced anywhere in the United States because local law enforcement officials recognize the absurdity of making criminal private homosexual acts. The homosexual, however, lives under the spectre and fear of intimidation by the police department and the threat of blackmail. The confirmed homosexual is in the anamolous position of engaging in behavior which law enforcement officials generally ignore (and in the case of Seattle police, supervise) unless and until the threat of prosecution or actual prosecution can be used by the police for purposes entirely independent of the sodomy statute.

The confirmed homosexual lives in a *legal environment* which can only be understood by a heterosexual if he or she would imagine what it would be like to live in a society where heterosexual conduct was made criminal, yet the statute making such conduct criminal was gen-

erally not enforced by law enforcement officials. This would be living in a police state of the worst sort. Just do one thing of which the law official disapproves and be subject to arrest for that which would otherwise go unpunished—the crime of engaging in heterosexual relations.

Petitioner is not here concerned with the *social environment* in which a homosexual must live. There are no constitutional guarantees, and there should be none, that minority conduct must be approved by society. The homosexual is not entitled to *special treatment*. He should, however, be given *equal treatment* and not be denied rights and privileges held by others—the right to be *left alone by the law* unless his conduct in some way impairs a legitimate secular public interest.

VII.

CONCLUSION

For the foregoing reasons, this Petition for Writ of Certiorari should be granted.

Respectfully submitted,

ARVAL A. MORRIS
MALCOLM L. EDWARDS
Counsel for Petitioner

610 United Pacific Building
Seattle, Washington 98104

APPENDIX A

1. CONSTITUTION OF THE UNITED STATES

(a) *First Amendment:*

"Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

(b) *Fifth Amendment:*

"No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

(c) *Fourteenth Amendment, Section 1:*

"Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without the due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

2. LAWS OF THE STATE OF WASHINGTON

Revised Code of Washington 9.79.100:

"*9.79.100 Sodomy—Penalties.* Every person who shall carnally know in any manner any animal or bird;

or shall carnally know any male or female person by the anus or with the mouth or tongue; or who shall voluntarily submit to such carnal knowledge; or who shall attempt sexual intercourse with a dead body, shall be guilty of sodomy and shall be punished as follows:

"(1) When such act is committed upon a child under the age of fifteen years, by imprisonment in the state penitentiary for not more than twenty years.

"(2) In all other cases by imprisonment in the state penitentiary for not more than ten years."

APPENDIX B

OPINION OF THE SUPREME COURT OF THE STATE OF WASHINGTON

[No. 38649. Department One. March 2, 1967.]

THE STATE OF WASHINGTON, *Respondent*,

v.

KEITH MILTON RHINEHART, Appellant.

HUNTER, J.—Keith Milton Rhinehart, defendant (appellant), was charged with sodomy in that he "did carnally know one James Guy Miller, a living human being and a male person, with the mouth and tongue; . . ." R.C.W. 9.79.100. He was found guilty as charged at the conclusion of a jury trial. Judgment and sentence was entered upon the jury verdict.

At the trial, 16-year-old James Miller, the main witness for the state, testified that at 1 a.m., the morning of April 11, 1965, he was summoned to the car of the defendant while he and two companions were on the streets of downtown Seattle. The defendant, driving a Cadillac convertible, asked Miller if he would like to earn some money and go to his place. Miller consented. The defendant then drove from downtown to his Capitol Hill apartment, which the witness Miller described as having a "monkey" tree in front of it. Miller also stated he noticed pictures of nude males in the defendant's apartment. Miller described furnishings of the apartment as including wood carvings and a round bed. Miller testified that the defendant made indecent propositions to him to which he agreed. After the act (as described in the charge) was completed, the defendant drove Miller downtown to rejoin his companions, giving him a slip of paper with his phone number should

Miller at a later time want to earn some more money. Miller and his two companions were later picked up by the police on a car prowling charge, which was dismissed on April 13, 1965. On April 14, 1965, Miller gave an account of his participation in homosexual acts with the defendant to Officer Von Allmen of the Seattle Police Department.

The defendant Rhinehart admitted meeting with Miller on the night in question, and stated he thought he recognized him as a member of his church; but denied that anything happened, as charged in the information. He stated that, as a minister of the Aquarian Foundation, a social reform group, he had studied all forms of sexual deviacy and on the night in question was trying to aid Miller, as an errant boy, with his problems. The defendant also claimed that Miller is a male prostitute who propositioned him as they were driving around the downtown area. Rhinehart, unequivocably, denied taking Miller to his apartment.

The jury by its verdict chose to believe the testimony of Miller, The defendant appeals.

The defendant first assigns error to the admission in evidence of the out-of-court statements given by Miller to the police. He contends these statements amounted to hearsay and could not be admitted so as to implicate him in the commission of the criminal offense charged. We disagree.

[1] The record discloses that witness Miller gave two statements to the police, the second one repudiating an inconsistent version of the alleged crime given earlier to a Mrs. Lemmon, a friend of the defendant. At the trial the statement to Mrs. Lemmon was introduced by the defend-

ant and was admitted for the purpose of impeaching the testimony of Miller on the stand. Thereafter, the challenged statements of the police were introduced to show that Miller's testimony was not a fabrication of recent date, and to rehabilitate the testimony of the witness after impeachment. The action by the trial court in admitting these statements was entirely consistent with the long-standing rule of *State v. Murley*, 35 Wn.2d 233, 212 P.2d 801 (1949), and *State v. Pitts*, 62 Wn.2d 294, 382 P.2d 508 (1963).

[2] Counsel for the defendant has filed in this court an affidavit, by Miller, wherein he has changed his testimony at the trial, stating that he lied, and now denies the occurrence of the alleged crime. On this basis, the defendant moves the court for a remand of the case to the superior court for its consideration of a motion for a new trial. Miller's sworn testimony at the trial was corroborated by other evidence. Moreover, his post trial affidavit is, in essence, the same as his statement to Mrs. Lemmon. It is therefore cumulative. In view of this record, the remand would not be justified. The motion is denied.

[3] The defendant assigns error to the ruling of the trial court in allowing the prosecutor to cross-examine the defendant with respect to various pictures of nude males and a magazine containing other pictures of men in the nude in the possession of the defendant. He contends that the fact of possession of materials, containing erotic or pornographic pictures, necessarily prejudiced the jury against him, since it would logically associate the possession of homosexual pornography to the likelihood of his committing the specific sexual act charged. The defendant,

over objection, during cross-examination admitted these pictures were in his possession at the time of the alleged occurrence of the crime, stating they were given to him by his parishioners and were used in his study of deviate sexual behavior. The pictures themselves were not admitted in evidence.

Under the circumstances of this case, since the pictures referred to were found where the alleged sex crime was asserted to have been committed, it was proper for the jury to consider this testimony and to give to it whatever weight it was entitled in light of all the evidence in the case. The testimony relative to the kind of pictures testified to as being observed by Miller was also admissible for the purpose of corroborating the evidence vital to the state, that Miller was in fact, as he testified, in the defendant's apartment. The trial court did not err in permitting the defendant's cross-examination as to the foregoing magazine and pictures.

[4] The defendant contends the trial court erred in limiting the examination in his testimony relative to police contact with him prior to his arrest. By this testimony, the defendant hoped to show that Miller acquired knowledge of the contents of his apartment from either other homosexuals who had visited his home, or from the police who had contacted him there at times prior to his arrest. This was an attempt to inject hearsay testimony into the case. There was no direct testimony in the record to establish this theory. It was speculative and thus within the discretion of the trial court to limit the examination of the defendant in this regard.

The defendant assigns error to remarks made by the

deputy prosecutor in his argument to the jury. These remarks tended to show that Miller had nothing to gain in telling the police of his participation in an act of sodomy with the defendant; since he was, by that time, cleared of the charge of car prowling and could only fear further confinement as the probable result of such an admission.

The defendant argues that release of the witness Miller from juvenile confinement could have depended completely upon the extent to which he would cooperate in giving a statement to aid in the arrest and conviction of the defendant. We think the argument to be without merit when considered with the testimony of Miller. He testified concerning the proceedings in juvenile court:

> Well, we got picked up for car prowling, but a person who is car prowling, we both told the police officer that he [another person] was the one—the one who was car prowling, and he said that he was, *so the judge said that we could go home. But then, I think it was the day after court, Officer Von Allmen came to see me about . . .* (Italics ours.)

[5] Defendant's theory of "connivance" is speculative and not supported by the record. The statements by the deputy prosecutor, based on competent evidence in the case, were therefore proper.

The defendant has assigned error to the denial of various post trial motions by the trial court. These, in large part, are based on constitutional arguments which we find to be inapplicable to the facts of this case or otherwise without merit.

The defendant contends that he was denied equal protection of the law since known homosexuals are permitted to participate in sexual activities in public bars and clubs

in Seattle under the supervision and control of the police department, and with its direct knowledge and assent; and yet the defendant was singled out for prosecution in allegedly committing the same acts.

[6] This contention is not a new one to this court, it being raised most recently in *State v. Reid*, 66 Wn.2d 243, 401 P.2d 988 (1965), and cases cited therein. We have repeatedly held that guilt or innocence cannot be made to depend on the question of whether other parties have or have not been prosecuted for similar acts. The failure of the state to prosecute others for the same or similar offenses is not a denial of due process or equal protection. The record shows that between 12 and 24 sodomy cases are filed annually in King County, and there is no merit to the defendant's contention that he was singled out for prosecution. On this point see *Yick Wo v. Hopkins*, 118 U.S. 356, 30 L. Ed. 220, 6 Sup. Ct. 1064 (1886), and *Two Guys From Harrison-Allentown, Inc. v. McGinley*, 366 U.S. 582, 6 L. Ed.2d 551, 81 Sup. Ct. 1135 (1961).

[7] The defendant next contends that the sodomy statute, R.C.W. 9.79.100, *supra*, is unconstitutional in that it purports to make criminal, private consensual acts which are not affected with sufficient public interest to be the subject matter of the exercise of the police power of the state. There is no merit to this contention. The legislature has, by this enactment, considered the public interest served by it. The prohibition of the statute is a proper exercise of the police power. See *State v. Sears*, 4 Wn.2d 200, 103 P.2d 337 (1940); *McDermott v. State*, 197 Wash. 79, 84 P.2d 372 (1938).

[8] The defendant further contends the sodomy statute, *supra*, is so vague that he was denied due process of law

guaranteed to him by the fourteenth amendment to the constitution of the United States. We disagree. The statute (R.C.W. 9.79.100) provides:

> Every person who shall carnally know in any manner any animal or bird; or who shall carnally know any male or female person by the anus or with the mouth or tongue; or who shall voluntarily submit to such carnal knowledge; or who shall attempt sexual intercourse with a dead body, shall be guilty of sodomy . . .

As such the statute gives fair notice of what acts will be punished. It specifically delineates ascertainable standards of guilt, so that men of reasonable understanding are not required to guess at the meaning of the statute. *Winters v. New York*, 333 U.S. 507, 92 L. Ed. 840, 68 Sup. Ct. 665 (1948). See our recent decision on the void for vagueness problem in *Seattle v. Drew*, 70 W.D.2d 383, 423 P.2d 522 (1967).

[9] The defendant finally contends that the sodomy statute violates the establishment clause of the first amendment to the constitution of the United States, in that, those persons who hold a majority belief have imposed their ethics on others who follow homosexual practices. We see no merit to this contention. The Supreme Court of the United States answered this question as early as 1890, in *Davis v. Beason*, 133 U.S. 333, 342, 33 L. Ed. 637, 10 Sup. Ct. 299, when it stated:

> With man's relations to his Maker and the obligations he may think they impose, and the manner in which an expression shall be made by him of his belief on those subjects, no interference can be permitted, provided always the laws of society, designed to secure its peace and prosperity, and the morals of its people, are not interfered with. However free the exercise of religion may be, it must be subordinate to the criminal laws of the country, passed with reference to actions regarded by general consent as properly the subjects of punitive legislation.

This view has been consistently followed as to other practices conflicting with the criminal law. *Reynolds v. United States*, 98 U.S. 145 25 L. Ed. 244 (1878) (polygamy); and *State v. Massey*, 229 N.C. 734, 51 S.E.2d 179 (1949), appeal dismissed, *Bunn v. North Carolina*, 336 U.S. 942, 93 L. Ed. 1099, 69 Sup. Ct. 813 (1949), rehearing denied, 336 U.S. 971, 93 L. Ed. 1121, 69 Sup. Ct. 939 (1949) (snake worship); see general discussion in 16 C.J.S. *Constitutional Law* § 206 (2).

The judgment and sentence of the trial court is affirmed.

HILL, ROSELLINI, and HALE, JJ., and BARNETT, J. Pro Tem., concur.

APPENDIX C

JUDGMENT (REMITTITUR) OF THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, *Respondent,* v. KEITH MILTON RHINEHART, *Appellant.*	REMITTITUR No. 38649 King County No. 42591

The State of Washington to: The Superior Court of the State of Washington in and for King County.

This is to certify that the opinion of the Supreme Court of the State of Washington filed on March 2, 1967, became the final judgment of this court in the above entitled case on May 3, 1967. This cause is remitted to the superior court from which the appeal was taken for further proceedings in accordance with the attached true copy of the opinion.

Pursuant to Rule 55 on Appeal, costs are taxed as follows:

Two Hundred Forty and 69/100 ($240.69) Dollars in favor of respondent and against appellant.

The Petition for Rehearing was Denied by an Order filed May 3, 1967.

cc: Court Reporter
MR. MALCOLM EDWARDS
HON. CHARLES O. CARROLL
MR. ROBERT E. DIXON
MR. J. ROBERT WALKER

SEAL

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the seal of said Court at Olympia, this 3rd day of May, A.D. 1967.

(SIGNATURE)

WILLIAM M. LOWRY

APPENDIX D

AFFIDAVIT OF JAMES MILLER

STATE OF WASHINGTON }
COUNTY OF KING } ss.

JAMES MILLER, being first duly sworn on oath. deposes and says:

1. I am the James Miller who testified against Keith Milton Rhinehart in the criminal case against him in King County, Washington Superior Court where he was charged with sodomy. The testimony I gave was false.

2. After being picked up for car prowling by some policemen, two other officers from the Seattle Police Department, one of whom was Officer Von Allmon, questioned me about the time I spent with Mr. Rhinehart on the morning that I was picked up. The officers had a file or files on Mr. Rhinehart. I did most of my talking to the officer other than Officer Von Allmon. This officer told me if I did not "cooperate" I would get into trouble. My understanding was that if I didn't give them something which would permit them to arrest Mr. Rhinehart that I would undoubtedly continue to be confined and might be returned to Fort Warden where I had been previously detained. I was on parole at the time.

3. The information in the statement about Mr. Rhinehart's home and what was in it and where it was located was all supplied to me by the police officer. He questioned me in such a way that I knew the answers that he wanted. He would say "Did you see a round bed in his room?" and I would know from the way he asked the question that there must be one there so I would tell him

that I did. I was not in Mr. Rhinehart's home and my testimony in this respect was not true.

4. Mr. Rhinehart did not commit sodomy on me or any sexual act of any kind.

5. I gave Mrs. Lemmon the statement denying any sexual act because it was true.

6. After I did not show up for the first trial, the police officers came and picked me up and sent me to Cascadia. I do not know why I was sent there because I had not done anything wrong.

7. I testified the way I did at the trial because I was under pressure. I felt that if I told the truth, the police officers who patrol First Avenue and the other areas that I like to be in would be particularly watchful of me and my freedom would be substantially deprived. I was also in Cascadia at the time and felt that if I told the truth it certainly wouldn't do any good as far as getting me released was concerned.

8. After I gave the testimony I was sent to Green Hill for two weeks and then released.

9. I know what it's like to be cooped up in jail and it bothers me that my false testimony will cause someone else to be in such a bad position.

10. Since the trial I have been to the Prosecuting Attorney's Office on at least two occasions to see if I could get clothes which were in evidence back. They wouldn't give them to me, which upset me because I need the clothing and don't have much clothing at all. I know that there is nothing anybody can do about getting my clothes back but it still makes me upset. My desire to

get my clothes back hasn't anything to do with my giving this statement. I also know that my giving this statement won't in any way help me get my clothes back.

11. Since the trial I have seen Mr. Rhinehart on two occasions. On one occasion I went up to his house along with several other people because I wanted to square this matter. I saw him once thereafter on the street but only to exchange hellos. When at his house along with these other people, I told all of them that nothing had happened, which was the truth.

12. On September 9, 1966 I called Malcolm L. Edwards, Mr. Rhinehart's attorney. Mr. Rhinehart had given me Mr. Edwards' name and phone number when I was at his house along with these other people. I called Mr. Edwards because Mr. Rhinehart said that was the only way that matters could be squared; that it wasn't enough for me just to tell him and these other people that what I had testified to was false. Mr. Edwards supplied me with transportation to and from his office. I called him voluntarily and he questioned me for about an hour on that day and I gave voluntary answers. Another person was in the room during the questioning. He was a law student who was doing some work for Mr. Edwards.

13. Mr. Edwards told me when we first started talking that all he wanted to hear was the truth. He said he didn't care if the truth was for or against his client, so long as he got the truth. He said that he could best represent his client by knowing the truth. The truth is what I told him. Nothing happened between Mr. Rhinehart and myself. Mr. Edwards did not suggest to me or tell me in any way what I should say. He just asked questions and

didn't accept what I said without questioning me pretty hard.

14. No one has given me or promised to give me anything in order to get me to give this affidavit or repudiate my testimony in any way. I am doing this strictly voluntarily.

15. At our conference, Mr. Edwards told me that he knew I could not read. He asked me that if he prepared an affidavit, would I come in and he would read it to me. I asked him how I would know for sure what I was signing. He suggested that if I had any concern about this that I could bring anyone in with me that I liked and have them read it to me and then I would sign it. The affidavit has been read to me, including this part, and the affidavit is true.

(signature) James G. Miller

Subscribed and sworn to before me this 26th day of September, 1966.

(signature) Malcolm L. Edwards
Notary Public in and for the state
of Washington, residing at Seattle.